Bank Pusat Kerjasama Bhd (in liquidation) v Mahkamah Perusahaan Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2-25-07-93
SITI NORMA YAAKOB J
22 AUGUST 1994

Labour Law *— Industrial Court — Powers — Whether can set aside its own striking out award — Whether can reinstate case — Whether power can be implied — Industrial Relations Act 1967 ss 29(g) & 30(5)*

The second respondent, Mohamad Najib bin Abu Bakar, was dismissed from the service of the applicant and applied under s 20(1) of the Industrial Relations Act 1967 ('the Act') for reinstatement. The matter was referred to the Industrial Court for adjudication. The hearing was adjourned many times, principally to await the outcome of related certiorari proceedings involving the applicant and its employees in the Kuala Lumpur High Court where the applicant sought to quash an award of the Industrial Court to the effect that leave to commence proceedings against a company in receivership was not required.

Eventually, the case was heard but the second respondent failed to appear and the Industrial Court struck out the case under s 29(g) of the Act. Subsequently, the second respondent's application to reinstate the case and to set aside the striking out award was allowed. The applicant then applied for, inter alia, an order of certiorari to quash the award reinstating the case. The issue was whether the Industrial Court has the power to set aside its own striking out award and to reinstate a case.

Held, dismissing the application:

(1) The Act does not specifically confer any power on the Industrial Court to reinstate a case and, unlike the High Court, it is not vested with any inherent jurisdiction to deal with such an application. However, the Industrial Court is empowered by s 30(5) to act according to equity and good conscience without regard to technicalities and legal form.

(2) The court accepted the second respondent's explanation for his absence, ie his mistaken belief that the case would be postponed pending the outcome of the related High Court proceedings regarding leave. As the object of reinstatement was to give the second respondent an opportunity to be heard, it was only right and equitable that the power to reinstate should be implied in s 29(g). It would be absurd if the Industrial Court were to have the power to strike out a case without its merits being heard but yet have no power to reinstate it on good grounds being shown.

[**Bahasa Malaysia summary**

Responden kedua, Mohamad Najib bin Abu Bakar, telah dipecat daripada perkhidmatan pemohon dan telah memohon di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('Akta itu') supaya dikembalikan jawatannya. Perkara itu dirujuk kepada Mahkamah Perusahaan untuk penghukuman. Perbicaraan itu telah ditangguhkan banyak kali, terutamanya untuk menunggu keputusan prosiding certiorari yang berkaitan, yang melibatkan pemohonan dan pekerjanya di Mahkamah Tinggi Kuala Lumpur di mana pemohon cuba membatalkan suatu award Mahkamah Perusahaan bahawa kebenaran untuk memulakan prosiding terhadap sebuah syarikat dalam penerimaan tidak diperlukan.

Akhirnya, kes itu telah didengar tetapi responden kedua gagal menghadirkan diri dan Mahkamah Perusahaan telah membatalkan kes itu di bawah s 29(g) Akta itu. Kemudiannya, permohonan responden kedua untuk menghidupkan semula kes itu dan mengetepikan award yang membatalkan kes itu telah dibenarkan. Selepas itu pemohon telah memohon untuk, antara lain, suatu perintah certiorari supaya membatalkan award yang telah menghidupkan semula kes itu. Isunya adalah sama ada Mahkamah Perusahaan mempunyai kuasa untuk mengetepikan awardnya sendiri yang membatalkan sesuatu kes dan untuk menghidupkan semula kes itu.

Diputuskan, menolak permohonan itu:

(1) Akta itu tidak secara spesifik memberikan sebarang kuasa kepada Mahkamah Perusahaan untuk menghidupkan semula sesuatu kes dan, berbeza daripada Mahkamah Tinggi, ia tidak diletakhak dengan sebarang bidang kuasa sedia ada untuk memutuskan suatu permohonan sedemikian. Bagaimanapun, Mahkamah Perusahaan diberi kuasa oleh s 30(5) untuk bertindak mengikut ekuiti dan perasaan hati baik tanpa menghiraukan perkara teknik dan bentuk undang-undang.

(2) Mahkamah menerima penjelasan responden kedua tentang ketidakhadirannya, iaitu beliau tersilap percaya bahawa kes itu akan ditangguhkan semasa menunggu keputusan prosiding Mahkamah Tinggi yang berkaitan itu berkenaan dengan kebenaran. Oleh kerana tujuan menghidupkan semula kes itu ialah untuk memberi responden suatu peluang untuk didengar, adalah betul dan berekuiti jika kuasa untuk menghidupkan semula sesuatu kes itu seharusnya tersirat di dalam s 29(g). Adalah tidak munasabah jika Mahkamah Perusahaan diberikan kuasa untuk membatalkan sesuatu kes tanpa mendengar meritnya tetapi tidak mempunyai kuasa untuk menghidupkannya semula apabila alasan baik ditunjukkan.]

[*Editorial Note*: The applicant has appealed to the Federal Court vide Civil Appeal No 03–37–94.]

A **Notes**

For cases on powers of the Industrial Court, see 8 *Mallal's Digest* (4th Ed) para 731; [1991] Mallal's Digest 1286.

Cases referred to

B *Carlsberg Brewery Malaysia Bhd v National Union of Drink Manufacturing Industry Workers* [1990] 2 ILR 468 (distd)

Lee Wah Bank Ltd v National Union of Bank Employees [1981] 1 MLJ 169 (refd)

C **Legislation referred to**

Industrial Relations Act 1967 s 20(1), 29(g), 30(5), (9), 33(1), (2), 33A, 33B, 56(1)

Interpretation Act 1967 s 40

Peh Lee Kheng (*Thavalingam Thavarajah* with her) (*Shearn Delamore & Co*) for the applicant.

D *VK Lingam* (*Adam Bachik* with him) (*VK Lingam & Co*) for the second respondent.

Cur Adv Vult

E **Siti Norma Yaakob J**: This is an application for an order for certiorari to quash Award No 346/92 granted by the first respondent and also for an order for prohibition prohibiting the first respondent from proceeding further in the hearing of a case of dismissal without just cause or excuse involving the second respondent.

F On 30 November 1987, the second respondent was dismissed from the service of the applicant following a domestic enquiry held on 29 June 1987, into 11 specific charges of misconduct.

Dissatisfied, the second respondent made representations to the Director-General for Industrial Relations under s 20(1) of the Industrial G Relations Act 1967 ('the Act') for reinstatement to his former position and on 26 November 1988, the Minister of Labour, acting under sub-s (3) of the same section, referred the representations to the first respondent for adjudication.

On 16 January 1989, the second respondent filed his statement of H case with the first respondent.

On 7 March 1989, upon the application of Bank Negara Malaysia, the applicant was placed under receivership by an order of court and Tuan Hj Zainal Abidin Puteh and Tuan Hj Ahmad Kamal bin Abdullah Al Yafii were appointed receivers to manage the affairs and property of the I applicant.

Resulting from this, the applicant questioned the jurisdiction of the first respondent to continue hearing the case in the absence of leave to be obtained by the second respondent from the High Court and the applicant

notified the first and second respondents that it would raise this procedural point by way of a preliminary objection before the first respondent.

The hearing of the case before the first respondent was adjourned many times, principally to await the outcome of related certiorari proceedings involving the applicant and its employees in the Kuala Lumpur High Court where the applicant sought to quash an award of the first respondent that decided that leave to commence proceedings against a company in receivership was not required.

Eventually, the first respondent notified the applicant and the second respondent that the hearing of the case was fixed for three days beginning from 17–19 August 1992.

Both the applicant and the second respondent received the notices of hearing but only the applicant appeared with its solicitor on 17 August 1992 and, after standing the matter down for one hour when the second respondent and his solicitor still failed to appear, the first respondent handed down its Award No 222/92 striking out the case.

On being made aware of the award, the second respondent applied to the first respondent on 16 September 1992, to have his case reinstated and to have Award No 222/92 set aside. On 20 October 1992, the first respondent heard the application and, in Award No 346/92, set aside Award No 222/92 and reinstated the second respondent's case. It is to quash this second award of the first respondent that the present proceedings were commenced and the only issue is whether the first respondent has the power to act as it did in setting aside Award No 222/92 and reinstating the second respondent's case for hearing.

The applicant contends that the first respondent does not have such a power for the following reasons:

(1) The Act itself does not confer such a power. Being a creature of statute, the first respondent can only act if empowered to do so by the Act which created it.

(2) Award No 222/92 is final and conclusive as no application was made to challenge it and under s 33B of the Act, it cannot be challenged, appealed against, reviewed, quashed or called in question in any court.

(3) After striking out the case in Award No 222/92, the first respondent becomes functus officio, unless the matter is brought back before it under:

   (i) section 30(9) of the Act which deals with the rectification of any award under the slip rule;

   (ii) section 33(1) of the Act which concerns the interpretation of any award;

   (iii) section 33(2) of the Act which deals with any variation to remove any ambiguity in the award; and

   (iv) section 56(1) of the Act which deals with the non-compliance with the award.

A The second respondent's application for reinstatement does not fall within any of these sections of the Act and this fact is conceded.

(4) Although the jurisdiction to strike out the case was derived from s 29(g) of the Act, the same subsection cannot be relied upon to confer the jurisdiction to have the same matter reinstated, as at the B time of the application to reinstate, there was no pending proceedings before the first respondent. It is submitted that the subsection is only applicable to pending proceedings.

It is true that the Act does not specifically confer any power to the first respondent to reinstate the second respondent's case and, unlike the High C Court, the first respondent is not vested with any inherent jurisdiction to deal with such an application. *Lee Wah Bank Ltd v National Union of Bank Employees* [1981] 1 MLJ 169 is the authority for this proposition.

Whilst it is true that s 33B of the Act regards any award of the first respondent to be final and conclusive, this does not oust the High Court D reviewing any such award and the only way that can be done is for the second respondent to seek to quash the award by certiorari proceedings in the High Court but in order to succeed, he must show that the first respondent had acted without jurisdiction or in excess of its jurisdiction. Since it is not disputed that the award was made in the exercise of the first respondent's power under s 29(g) of the Act, there is no way by which the E second respondent can quash the Award No 222/92 by way of certiorari. His only remedy is to go back to the first respondent to seek reinstatement as the award was made in default of his appearance at the date of the hearing and not on the merits of his case.

In any event, the finality and conclusiveness of any award is subject F to the qualifying words, 'Subject to this Act and the provisions of section 33A' appearing at the beginning of s 33B. The provisions of s 33A of the Act are not relevant but the words 'subject to this Act' are very material.

This is so as the first respondent is empowered by s 30(5) of the Act to act according to equity and good conscience without regard to G technicalities and legal form. In this instance, the conduct of the second respondent is most relevant to determine whether he can successfully appeal to the good conscience of the first respondent to have his case reinstated.

To begin with, why were he and his solicitors absent on 17 August 1992? He has admitted that his solicitors received the notice of hearing H sent by the first respondent but nevertheless chose not to appear as he had regarded 17 August 1992 to be only a mention date as at that period of time, the issue of leave had not yet been decided by the High Court. Placed under such a mistaken belief, he had concluded that his case would have been postponed in any event.

I Under the circumstances of this case, I accept the second respondent's explanation to be a reasonable one as all along the parties had taken the stand that the future conduct of the second respondent's case before the first respondent would depend on the outcome of the High Court

proceedings regarding leave. It was principally for this reason that all previous hearing dates before 17 August 1992, were adjourned to await the outcome of the High Court proceedings. A

There is also the factor that from the time the applicant was placed under receivership, it had taken the stand that the second respondent must obtain leave to prosecute it and such objection would be raised as a preliminary objection at the hearing. Yet on 17 August 1992, in the absence of the second respondent, no such objection was raised by the applicant as seen from the award handed down by the first respondent. Instead, the applicant was content to go along with the first respondent when the case was struck out, being fully aware that the proceedings in the High Court for leave were still pending and by so doing, the applicant, I consider, had stolen a march on the second respondent. B C

Bearing in mind that the object of reinstatement is to give the second respondent an opportunity of being heard, it is only right and equitable that there should be implied in s 29(g) of the Act the power to reinstate as well. It seems rather absurd that the first respondent has the power to strike out a case without its merits being heard but yet has no power to reinstate the same case on good grounds being shown. D

In this respect, the order of the High Court in Originating Motion No 25–2–91 quashing the award of the Industrial Court, which reinstated a wrongful dismissal case, was relied upon by the applicant to show that the first respondent had no power to reinstate under s 29(g) of the Act. The facts of that case, *Carlsberg Brewery Malaysia Bhd v National Union of Drink Manufacturing Industry Workers* [1990] 2 ILR 468, are distinguishable in that the first award striking out the case was made following the Union's failure to submit a statement of case following a notice to that effect. The Union was requested to file the statement within seven days. No action was taken by the Union despite three reminders sent to the solicitors of the Union to file a statement of case within one month of the order, failing which the striking out would become final. The Union still failed to file the statement before the order to strike out became final. Five months after the expiry of the last extension, the Union wrote to the Industrial Court to reinstate its case and the Industrial Court did so notwithstanding its earlier award which had already become final. E F G

At the hearing of the certiorari proceedings, the Union conceded that the Industrial Court was functus officio at the hearing of the application for reinstatement by virtue of the terms of the earlier award striking out the case, and it was under these circumstances that the order for certiorari was granted by the High Court to quash the second award of the Industrial Court reinstating the case. Clearly the Industrial Court was functus officio by virtue of the first award. The facts of *Carlsberg*'s case are completely different from the facts of the instant case before me. H

Section 29(g) of the Act is an enabling subsection and the approach that should be adopted when interpreting such provisions is that set out by s 40 of the Interpretation Act 1967 to be as follows: I

A (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

In the *Lee Wah Bank*'s case above, Hashim Yeop A Sani J, in considering
B s 40, had this to say of such powers:

> These are powers which are necessarily implied and nothing more. Since the Industrial Court is a creature of the Industrial Relations Act 1967 its powers must be discovered only from the four corners of the Act — expressly or by necessary implication ...

C Since s 29(g) of the Act enabled the first respondent to strike out the second respondent's case on 17 August 1992, without its merits being heard, likewise it is my considered opinion that the power to reinstate the very same case on good grounds being shown can be implied to the subsection and to that end, Award No 346/92 has been properly made within the framework of the Act.

D The second respondent had also questioned the failure of the applicant to file a statement of reply in the proceedings before the first respondent but I consider this objection to be a non-issue as the failure is consistent with the applicant's stand that leave must first be obtained before the second respondent can proceed further against it.

E Likewise, I regard the objection that the receivers, having been discharged by the High Court on 2 September 1993, on the application of Bank Negara, cannot continue the present proceedings before me, to be also a non-issue.

To begin with, the instant proceedings before me were commenced
F in January 1993, when the receivers had not yet been discharged. The order of court dated 2 September 1993, also substituted the receivers with the appointees of Bank Negara. If anything at all and to give effect to the order, an amendment would be in order, to reflect the proper parties representing the applicant, but in the absence of such an amendment, I
G consider that nobody had been prejudiced. To that end, I consider the objection on locus standi to be a non-issue.

For the reasons I have given, neither certiorari nor prohibition can lie to quash Award No 346/92 and to that end, I had dismissed this originating summons with costs.

H *Application dismissed.*

Reported by Anne Khoo

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